STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v NORMAN TERRY REITMEYER, Defendant-Appellee.	UNPUBLISHED April 24, 2008 No. 276207 Washtenaw Circuit Court LC No. 06-000336-FC

Before: Bandstra, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of criminal sexual conduct in the second degree (CSC II) (victim under 13 years of age), MCL 750.520c(1)(a), distributing obscene matter to a minor, MCL 722.675, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to serve a term of imprisonment of two years for felony-firearm, consecutively to concurrent terms of 30 to 270 months for the CSC conviction, 13 to 36 months for the obscenity conviction, and 13 to 90 months for the felon in possession conviction. Defendant appeals as of right. We affirm, but remand for a ministerial correction in the judgment of sentence.

I. Facts

This case arose from an incident between defendant and a boy who was then three years old. The child's mother testified that she and the boy had shared an apartment with defendant, and that she would leave her child in defendant's care while she was at work. According to the mother, on the day in question she returned home from work early, "heard a porno playing really loud back in my son's bedroom," entered the room, and discovered defendant and her son both naked, with defendant "laying on his back on the bed" and the son "halfway laying down leaned over his stomach." The victim's mother continued that she picked up the boy and retreated to the laundry room, where she noticed that the boy had an erection, and where the boy said that defendant "touched my pee-pee and made me touch his." This witness testified that she then called 911, and that the police arrived shortly thereafter. The police subsequently executed a search warrant, and discovered three pornographic videocassettes, plus a shotgun and ammunition, on the premises.

Defendant admitted that he was naked with the youngster while a pornographic video was playing, but testified that he was naked on that occasion only because he had just emerged from the shower, and that the boy himself had found and begun playing the pornographic video. According to defendant, he was crawling across the bed to turn off the video, while the boy was jumping on the bed and laughing, when the child's mother entered the room. Defendant denied ever touching the boy in a sexual way.

On appeal, defendant argues that the trial court erred in disallowing evidence of previous allegations of sexual abuse, and in assessing as part of the sentence court costs and attorney fees.

II. Evidence of False Allegations of Sexual Abuse

After the victim's mother testified, the prosecutor called to the stand a long-time friend of that witness, who testified that she had encouraged defendant to allow the mother and child to live with him. On cross-examination, defense counsel asked if the mother had ever indicated that she had been sexually abused herself. In response to an objection, defense counsel explained that she was trying to elicit testimony that the mother had earlier falsely reported that she had been sexually abused in order to impeach that witness's credibility. The prosecutor opined that such inquiry was not relevant because there were no allegations regarding the victim's mother herself. The trial court sustained the objection, expressing doubts about relevance.

Defendant argues that the trial court denied him a fair trial by curtailing a legitimate inquiry into the key prosecution witness's credibility. We disagree.

We review a trial court's evidentiary decisions for an abuse of discretion. *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002). An abuse of discretion occurs when the trial court chooses an outcome falling outside a "principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Witness credibility is always at issue, and may be attacked on cross-examination. See MRE 611(b). However, "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime . . . , may not be proved by extrinsic evidence." MRE 608(b).

In this case, defense counsel was at liberty to attempt to impeach the victim's mother's credibility through cross-examination over her having allegedly falsely reported that she had herself been sexually abused, MRE 611(b), but counsel did not take the opportunity. In any event, however, testimony from another witness over the same matter would have been inadmissible. MRE 608(b). Defense counsel could have questioned the victim's mother regarding the allegation that she falsely reported sexual abuse, but could not elicit such information from another witness. See *People v Teague*, 411 Mich 562, 566; 309 NW2d 530 (1981) (extrinsic evidence may not be used to impeach a witness on a collateral matter). Accordingly, we reject this claim of error.

III. Costs and Fees

In addition to the terms of imprisonment, the trial court ordered defendant to pay $1,280 in court costs, and $500 in attorney fees. There was no objection to either of these financial assessments at sentencing, which leaves appellate challenges relating to them unpreserved.

We normally review awards of both costs and fees for an abuse of discretion. See *In re Condemnation of Private Property for Highway Purposes (Dep't of Transportation v Curis)*, 221 Mich App 136, 139-140; 561 NW2d 459 (1997) (fees); *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 518; 556 NW2d 528 (1996) (costs). However, a defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Where unpreserved plain error is shown, reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity of public reputation of judicial proceedings independent of the defendant's innocence. In this case, because these challenges involve only the financial aspects of defendant's sentence, we regard plain-error review as requiring that we ascertain whether defendant has shown that those financial obligations were unlawfully imposed.

A. Court Costs

"A trial court may require a convicted felon to pay costs only where such requirement is expressly authorized by statute." *People v Slocum*, 213 Mich App 239, 242; 539 NW2d 572 (1995). See also *People v Jones*, 182 Mich App 125, 127; 451 NW2d 525 (1989). In this case, because there was no objection, the trial court felt no obligation to indicate the authority under which it imposed court costs. However, the enactment of the legislative sentencing guidelines included the authorization of a trial court, "[a]s part of the sentence," to "order the defendant to pay any combination of a fine, costs, or applicable assessments," as well as restitution as provided by law. MCL 769.34(6). Further, MCL 769.1k(1)(a), which went into effect on January 1, 2006, likewise authorizes the imposition of costs.

Defendant argues that his crimes occurred in 2005, before the effective date of MCL 769.1k, and that application of that statute violates his right against application of ex post facto law. See US Const, art 1, § 9 cl 3. However, the record consistently shows that the date of the criminal conduct at issue was in February of 2006, not 2005. Because that date came after the effective date of MCL 769.1k, defendant's attempt to avoid its application must fail.

B. Attorney Fees

Defendant went to trial with a court-appointed attorney, at public expense, on the ground of indigence. See MCR 6.005(A) and (D). However, "If a defendant is able to pay part of the cost of a lawyer, the court may require contribution to the cost of providing a lawyer and may establish a plan for collecting the contribution." MCR 6.005(C).

A trial court making a determination of a defendant's ability to afford counsel is normally obliged to consider the factors set forth in MCR 6.005(B). But where a defendant fails to object to a reimbursement amount at the time it is ordered, the trial court need not make a finding on the record concerning the defendant's ability to pay. *People v Dunbar*, 264 Mich App 240, 254; 690

NW2d 476 (2004). "However, the court does need to provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay." *Id.* at 254-255. In this case, although the record includes no commentary from the trial court on the question of defendant's ability to pay, we note that the court entered an order to remit prisoner funds for fines, costs, and assessments, which sets forth a plan for deducting such funds from defendant's prisoner account as a fraction of funds received by defendant while incarcerated. We further note that this plan thus collects funds from defendant only if and as they become available. We are satisfied from this record that the trial court well considered defendant's ability to pay in ordering him to reimburse $500 of the expense the public bore for his appointed trial attorney.

However, an order to reimburse attorney fees is not properly considered part of the sentence, and so should not appear as part of the judgment of sentence. *Dunbar, supra* at 256 and n 15. The trial court's separate order in the matter satisfies that procedural requirement. See *id.* at 256. However, we hereby vacate that aspect of the judgment of sentence, and remand this case to the trial court for the ministerial task of preparing a judgment of sentence amended to make no reference to attorney fees.

Affirmed, but remanded for a ministerial correction in the judgment of sentence. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey